IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0552

STATE OF MONTANA,

Plaintiff and Appellee,

v.

TYSON LEE HAPPEL,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Gregory R. Todd, Presiding

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The Appellant, Happel, maintains the arguments made in his opening brief and offers the following reply to the State's brief.

Under the section heading "Applicable Law," the State correctly summarizes the controlling decisions, such as *State v. Finley*, 276 Mont. 126, 915 P.2d 208 (1996), *State v. Weaver*, 276 Mont. 505, 917 P.2d 437 (1996), and *City of Billings v. Smith*, 28 Mont. 133, 932 P.2d 1058 (1997), in which this Court has required district courts to make adequate inquiry into complaints of ineffective assistance of counsel. (Appellee's Br. at 13-15.) The State then accurately cites four more recent cases affirming that district courts have an obligation to make adequate initial inquiries into complaints of ineffective assistance connected to requests for appointment of new counsel. (Appellee's Br. at 16.) However, after the State's admirable recitation of this Court's settled, controlling decisions, the State goes on to assert that none of these cases are good law because they rely on a misstatement in *State v. Enright*, 233 Mont. 225, 229, 758 P.2d 779, 782 (1988), that an "accused has a right to 'meaningful client-attorney relationship' with her attorney." (Appellee's Br. at 17-18.) The State explicitly argues that the initial inquiry

requirement in *Finley*, *Weaver*, and *City of Billings* should now be "overruled" by this Court.[1] (Appellee's Br. at 18.)

Review of *Finley*, *Weaver*, and *City of Billings* reveals that the relevant analysis in these decisions does not rest on the meaningful relationship misstatement from *Enright*. Although these decision may have come during a period in which the Court had made a misstatement regarding a right to a meaningful attorney-client relationship, in none of them did this Court actually rely on that misstatement in reaching its conclusions that district courts must make adequate inquiry into the ineffective assistance complaints of defendants requesting new counsel. In *Finley*, for example, the Court held:

> In determining whether Finley presented seemingly substantial complaints about the *effectiveness* of his counsel, the District Court should have inquired into the complaints and made some sort of a critical analysis at the time the motion was filed. The District Court failed to make an initial determination of whether Finley presented substantial complaints in his pro se motion, and accordingly erred in that respect. However, in this case, the District Court corrected its error by conducting a post-trial hearing on Finley's complaints regarding his counsel's *representation*.

Finley, 276 Mont. at 143, 915 P.2d at 219 (emphasis added). The error in *Finley* had nothing to do with a failure to inquire into the meaningfulness of Finley's

[1] The State made a similar request that this Court overrule other initial inquiry cases, such as *State v. Gallagher* (*Gallagher I*), 1998 MT 70, 288 Mont. 180, 955 P.2d 1371, and *Halley v. State*, 2008 MT 193, 344 Mont. 37, 186 P.3d 859, in its briefing of the recent *State v. Campa*, DA 09-0369, appeal.

relationship with his attorney. Rather this Court expressly grounded its pronouncement in the district court's failure to inquire into Finley's complaints about counsel "effectiveness" and "representation."

In *City of Billings* and *Weaver*, the Court did not even mention the existence of a right to a meaningful attorney-client relationship. The Court's conclusion in *City of Billings* that the district court failed to make adequate initial inquiry because it "did not allow [the defendant] to elaborate on his complaints nor did it inquire into [the defendant's] factual complaints regarding counsel's lack of knowledge of the case" explicitly rested on the district court's failure to ask questions about counsel's alleged lack of preparation. *City of Billings*, 281 Mont. at 140, 932 P.2d at 1062. In *Weaver*, the Court faulted the district court for failing to make "even a cursory inquiry into Weaver's complaints about his counsel's representation." *Weaver*, 276 Mont. at 511-12, 917 P.2d at 441. Weaver's complaints were that his attorney waived a hearing without his consent, withheld vital case information, and failed to prepare for trial, all of which relate to attorney performance, not camaraderie. *Weaver*, 276 Mont. at 510, 917 P.2d at 440.

Tellingly, even after 2001 when this Court corrected its misstatement in *Enright* regarding the right to a meaningful client attorney relationship, *State v. Gallagher* (*Gallagher II*), 2001 MT 39, ¶ 21, 304 Mont. 215, 19 P.3d 817, this Court has consistently continued to enforce the initial inquiry requirement applied

in *Finley*, *Weaver*, and *City of Billings*. Last year, for example, in *State v. Rose*, 2009 MT 4, 348 Mont. 291, 202 P.3d 749, this Court, citing to *City of Billings*, stated that the initial inquiry "is sufficient if the district court considers the defendant's factual complaints together with counsel's specific explanations addressing the complaints." *Rose*, ¶ 96; *see also, Halley*, ¶¶ 16-18 ("[A]n initial inquiry is adequate when the district court considers the 'defendant's factual complaints together with counsel's specific explanations addressing the complaints.'"); *State v. Gazda*, 2003 MT 350, ¶ 30, 318 Mont. 516, 82 P.3d 20 (same). The State has not attempted to articulate how this Court's post-2001 decisions can be distinguished on the basis of the *Enright* meaningful relationship misstatement.

Next, the State asserts--without analysis--that Happel's case "is also distinguishable from *many* substitution-of-counsel cases" on the basis that Happel did not allege a complete breakdown in communication with counsel. (Appellee's Br. at 20 (emphasis added).) Although it is true that Happel did not make such an allegation while defendants in some--but not all--of the Court's other initial inquiry cases did, this difference is of no importance to the analysis requiring an initial inquiry. For example, in the *Gazda* case cited by the State (Appellee's Br. at 20), the nature of the defendant's ineffective assistance allegation as being a "total lack of communication" is mentioned once in the beginning, factual section of the

opinion and then never again. *Gazda*, ¶ 5. The operative question during a district court's initial inquiry is whether there is "a 'seemingly substantial complaint' about effective assistance" warranting the counsel's replacement. *City of Billings*, 281 Mont. at 136, 932 P.2d at 1060. A total breakdown in communication is just one of many ways in which an attorney can render ineffective assistance. *See e.g.*, *State v. Rose*, 1998 MT 342, ¶ 20, 292 Mont. 350, 972 P.2d 321 (failing to request an accomplice jury instruction); *City of Billings*, 281 Mont. at 140, 932 P.2d at 1062 (not being prepared for trial); *Weaver*, 276 Mont. at 510,917 P.2d at 440 (waiving hearing without consent, withholding information, and not preparing for trial); *see also, Henderson*, ¶ 7 ("The overarching duty of a criminal defense counsel is to advocate on behalf of the defendant, to meet, test and refute the case of the prosecution."). In any case, "the threshold issue is not whether counsel was ineffective, but whether the District Court erred in failing to make an adequate inquiry into his claim of ineffective assistance of counsel." *Weaver*, 276 Mont. at 510-11, 917 P.2d at 441. Happel's allegations were allegations of ineffective assistance and, thus, triggered the district court's obligation to make inquiries into whether the complaints were seemingly substantial.

A central fallacy of the State argument is the State's assumption that the existing record before the district court definitively established the inaccuracy of Happel's ineffective assistance complaints. (*See* Appellee's Br. at 18, 20-21, 23-25.) This assumption is not true. What the State's argument neglects is that the record does not and cannot establish matters that are not in the record. That is, although the record indicates that at his change of plea hearing Happel answered in the affirmative that he understood the plea agreement was not binding on the district court and that the maximum possible persistent felony offender sentence was one hundred years (3/5/09 Tr. at 4-5), the record does not preclude the possibility that Happel answered these questions inaccurately at the change of plea hearing under improper pressures from his attorney or his attorney's deficiencies.

For example, in *State v. Henderson*, 2004 MT 173, 322 Mont. 69, 93 P.3d 1231, a defendant stated on the record at the change of plea hearing that his attorney's representation was acceptable, signed a written acknowledgement of rights, and entered an *Alford* plea that the district court at the time found to be knowing and voluntary based on the existing record. *Henderson*, ¶¶ 23, 25 (Warner, J., dissenting). However, following a postconviction evidentiary hearing that allowed for the development of facts beyond the existing record, the defendant was able to demonstrate facts in contradiction to this existing record that convinced this Court that he had been denied effective assistance of counsel with respect to

his plea despite his statements and written acknowledgment at the change of plea. *Henderson*, ¶¶ 6-16.

Similarly, here, the mere fact that Happel answered, "Yes, ma'am" to the judge's plea colloquy inquiries does not inherently preclude the possibility that his attorney had not adequately advised him. He could have just been answering "Yes, ma'am" to all of the judge's questions and initialing all of the items on the Waiver of Rights because that is what he was told to do. Without a few, brief inquiries by the district court into Happel's ineffective assistance allegations--which postdated his statements at the change of plea hearing by some seven weeks--it is impossible to definitively rule out the possibility of ineffective assistance by defense counsel that was not apparent on the existing record. As in *Weaver*, where the defendant also signed an "Acknowledgement of Waiver of Rights by Plea of Guilty" and pled guilty, the existence of such statements in the record does empower a district court to summarily deny a request for new counsel without making adequate inquiries into the defendant's new allegations of ineffective assistance of counsel. *See Weaver*, 276 Mont. at 507, 511-12, 917 P.2d at 439, 441-42.

Similarly, the State's assertion in its harmless error argument that "there is no reasonable possibility that the complaint would be deemed 'seemingly substantial'" neglects the possibility that if the district court had actually inquired of Happel and counsel regarding his complaints, then information beyond the

existing record could have been developed demonstrating ineffective assistance and the corresponding involuntariness of his plea. The State in essences argues that Happel's claim that he was denied an adequate initial inquiry must lose on appeal because he does not now have the facts that could have been developed through the very inquiry he was denied. Moreover, the question for this Court to decide in an adequate initial inquiry case "is not whether counsel was ineffective, but whether the District Court erred in failing to make an adequate inquiry into his claim of ineffective assistance of counsel." *Weaver*, 276 Mont. at 510-11, 917 P.2d at 441. The State's citation to Mont. Code Ann. § 46-20-701(1) is inapposite as Happel is not at this point asking that conviction be "reversed" but merely that the matter be remanded for the required initial inquiry. Only if that initial inquiry shows his complaints to being seemingly substantial and then the subsequent hearing establishes ineffective assistance (including prejudice) would Happel's conviction be affected.

The State's accusation that seeking a brief district court inquiry is a "'ploy'" that "would allow defendants to disrupt or delay proceedings at any time simply by crying 'ineffective assistance of counsel'" (Appellee's Br. at 18-19) is specious. Depending on the answers received, the adequate initial inquiry in this case could literally have been accomplished in five minutes by the district court turning to defense counsel and asking her whether she did or did not advise Happel regarding

the matters he alleged and then turning to Happel and allowing him an opportunity to respond to counsel's statement, explain his previous change of plea colloquy statements, and specifically substantiate his general accusation regarding counsel's lack of knowledge, skill, preparation, and communication. The whole inquiry could have been accomplished on the spot with a few brief questions and answers during either the existing May 11, 2009, or May 22, 2009, court appearances. If, as the State contends, there is no basis to Happel's ineffectiveness complaints, then the district court could have inquired of Happel and counsel and determined the complaints not to be seemingly substantial within a matter of minutes. If, on the other hand, Happel's complaints are true and he or counsel were able--if given the opportunity--to articulate a factual basis for them that is not apparent from the existing district court record, then the district court could have found them to be seemingly substantial and moved on to a formal second-stage hearing. The district court reviewed and considered the State's five page Point Brief on Defendant's Complaint and/or Improper Motion to Withdraw Guilty Plea (D.C. Doc. 18; 5/22/09 Tr. at 2:19), which surely took a few minutes, but it would, the State now argues, have been an unwarranted disruption and delay to have given Happel just a single opportunity to respond in court to the State's brief and personally explain his specific complaints.

Happel is not--as the State suggests--asserting that as part of the initial inquiry a district court is required to hold a "hearing," nor is the State correct that there is confusion in this Court's case law as to the difference between an "initial inquiry" and a "hearing." (*See* Appellee's Br. at 17-21.) "Hearing" in this context refers to a formal court event to decided the merits of the defendant's ineffective assistance claim at which the defendant is entitled to appointment of alternative counsel. *State v. Glick*, 2009 MT 44, ¶ 13, 349 Mont. 277, 203 P.3d 796; *Gazda*, ¶¶ 28, 32. The "initial inquiry" sought by Happel through this appeal is not a "hearing" as it would not resolve merits of Happel's claims, would not entitle him to temporary alternative counsel, and would not involve the swearing of witnesses or the formal admission of evidence. As the State agreed in *Gazda*, an "initial inquiry" is adequate where the defendant is given "the opportunity to voice his complaints" and the attorney "respond[s] to these complaints." *Gazda*, ¶ 31; *see also*, *Glick*, ¶ 13 (describing an "initial hearing" as "when the court entertains the defendant's specific complaints and counsel's specific explanations addressing those complaints"); *Gallagher I*, ¶¶ 15, 22 (same); *City of Billings*, 281 Mont. at 140-41, 932 P.2d at 1062-63 (holding the district court's response inadequate where it refused to let the defendant explain his complaints and made no inquiry into the allegations).

Ironically, the State also argues that Happel's allegations were not "vague" enough to warrant inquiry by the district court. The State contrasts the defendants in *Finley*, *Weaver*, and *City of Billings*, as having made "initial allegations of counsel's ineffectiveness [that] were so vague that no adequate determination could be made whether they were 'seemingly substantial' unless further inquiry was made." (Appellee's Br. at 19-20.) The State suggests that if only Happel, like the defendants in *Finley*, *Weaver*, and *City of Billing*, had been a bit *less* specific in his complaints, then he might have been entitled to "further inquiry" by the district court. Putting aside the oddity of the State asserting that defendants who make "vague" complaints should be entitled to more procedural protections and due process than ones who are specific, Happel would note that his third complaint regarding counsel was equal in breath and generality to anything in *Finley*, *Weaver*, or *City of Billings*. Happel alleged:

> Finally, the defendant offers the fact that counsel did not provide competent representation whereas she failed to notify defendant with a proper legal knowledge, skill, thoroughness and preparation reasonably necessary pursuant to rules of professional responsibility (Rule 1.1); nor did she communicate a reasonable request for information so the defendant could make an "informed" decision pursuant to (Rule 1.4); nor did counsel assist the defendant in a good faith effort to determine the validity, scope, meaning or application of the law nor the consequences there-involved.

(D.C. Doc. 17 at 3-4.) These allegations of failures to communicate, to determine the applicable law, or to have proper knowledge, skill, and preparation certainly

meet the State's proposed test of being "so vague that no adequate determination could be made whether they were 'seemingly substantial' unless further inquiry was made." (*See* Appellee's Br. at 19-20.)

This Court's initial inquiry decisions allow district courts to efficiently deal with meritless requests for new counsel while maintaining defendants' minimal due process right to be heard and protecting defendants against actual deprivations of their right to effective assistance of counsel. The balance struck by this Court regarding the need for an adequate--but informal--initial inquiry by the district court has been successfully functioning in Montana's courts for decades. The State now asks this Court to overturn this settled balance and replace this Court's prior decisions with Ninth Circuit case law. Happel merely requests this Court to apply its existing decisions requiring district courts to make inquiries into a defendant's complaints and affording defendants an in-court opportunity to personally explain and substantiate them.

The district court, here, abused its discretion by summarily denying Happel's request for new counsel without making inquiries into his ineffective assistance complaints. The modest remedy sought by Happel is a limited remand for the district court to perform the brief, adequate initial inquiry that it failed to conduct in May of 2009.

Respectfully submitted this ____ day of July, 2010.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 5,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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KOAN MERCER